No. 80-681

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MICHAEL RODAK JR.

In the Supreme Court of the United States

OCTOBER TERM, 1980

LOCAL LODGE NO. 875,
BROTHERHOOD RAILWAY CARMEN OF THE
UNITED STATES AND CANADA, AFL-CIO, PETITIONER

v.

RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

Department of Justice
Washington, D.C. 20530
(202) 633-2217

CARIN ANN CLAUSS
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

MARY-HELEN MAUTNER
RUTH E. PETERS
MARY S. ELCANO
Attorneys

Department of Labor
Washington, D.C. 20210

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QUESTION PRESENTED

Whether the undisputed facts of this case establish that petitioner failed to apply its officer eligibility requirements uniformly, in violation of the Labor-Management Reporting and Disclosure Act of 1959.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A-1) summarily affirming the district court's decision is noted at 622 F.2d 1042. The order of the district court (Pet. App. A-3) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1980. A timely petition for rehearing was denied on September 11, 1980 (Pet. App. A-2). The petition for a writ of certiorari was filed on October 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Secretary of Labor brought this action against petitioner on July 14, 1978, pursuant to the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. 401 *et seq.*, seeking to compel the removal of W.R. Dunaway and the installation of R.W. Coffey as chairman of petitioner's Local Protective Board. The district court granted summary judgment for the Secretary (Pet. App. A-3), and the court of appeals affirmed (*id.* at A-1).

The undisputed facts showed that R.W. Coffey and W.R. Dunaway were nominated for the office of chairman of the Local Protective Board of Lodge 875 during the lodge meeting held in November 1977 (R. 73).[1] In the election held on December 6, 1977, Coffey defeated Dunaway by a margin of 144 to 103 votes (R. 73). Dunaway protested the election on

[1] "R." refers to the record in the court of appeals.

the ground that Coffey was not qualified for union office because he failed to satisfy the meeting attendance requirements of Section 26 of the Subordinate Lodge Constitution (R. 48, 73). Section 26 requires attendance or an excuse for non-attendance at a majority of the meetings of the lodge held during the 12 months preceding the election (Pet. 24). Section 26 further provides that excuses for non-attendance are to be accepted or rejected by a vote of the members in attendance when the excuse is offered.

Coffey had attended one and Dunaway had attended four of the nine meetings held in 1977 (R. 29, 75). During the 12 months preceding the election, neither Dunaway nor Coffey had submitted written statements seeking excused absenses to the recording secretary for presentation to the membership (R. 75-76). Although Coffey and Dunaway were therefore ineligible for office under Section 26, Lodge 875 permitted them, as well as other members who did not meet the requirements of the section, to run for office (R. 29, 54-56).

The constitutions of Lodge 875 and its International Union provide no specific procedure for protest concerning officer elections. Dunaway protested the election by letter dated December 22, 1977, addressed to the International. Upon learning of Dunaway's protest, Coffey and the members of Lodge 875 met on January 16, 1978, and wrote to the International requesting that either Coffey's election be sustained or a new election held, in which the requirements of Section 26 would be waived (R. 99, 101). The International investigated the qualifications of all nominees for office and found that both Dunaway and Coffey, among others, were ineligible under Section 26 (R. 48, 55).

On January 31, 1978, the International ordered a new election for the position of chairman. On February 7, 1978, it rescinded that decision, declared Dunaway to be the new chairman, and directed that he be installed (R. 48, 59).[2] The purported basis for the International's sudden change of position was that Dunaway had previously written to the lodge president asking to be excused from two meetings and that the excuse requests had been acknowledged by the president (R. 59). These requests were never presented to the recording secretary, recorded in the minutes, or voted upon by the members as required by Section 26 (R. 75, 76).

On February 14, 1978, the date Dunaway was installed as chairman, the members of Lodge 875 voted to continue their opposition to Dunaway's installation. By letter dated February 22, 1978, and addressed to the International's general president, Coffey and other members reiterated their opposition to Dunaway's installation and requested a new election. That request was denied.

In April 1978, Coffey filed a complaint with the Secretary of Labor (R. 130-131). The Secretary investigated the complaint and concluded that it was premature. On May 15, 1978, after unsuccessfully pursuing the available union remedies for more than three months, Coffey filed another complaint with the

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[2] As early as January 1978, the International was on notice that several candidates who had been elected to office were ineligible under Section 26 (R. 54-56). Nevertheless, only Coffey was deprived of his office. As late as January 30, 1979, six months after this suit had been filed and more than a year after the election, petitioner admitted that certain officers who had not met the Section 26 requirements at the time of the December 1977 election were still in office (R. 74).

Secretary (R. 112-116). The Secretary filed this action in the United States District Court for the Southern District of Mississippi within 60 days thereafter.

The district court granted the Secretary's motion for summary judgment on September 4, 1979, ordering petitioner to remove Dunaway from office and to install Coffey as chairman of the Local Protective Board. The court of appeals summarily affirmed.

ARGUMENT

1. The legal principles governing qualifications for election to local union office are well established. Section 401(e) of the LMRDA, 29 U.S.C. 481(e), provides that "every [local union] member in good standing shall be eligible to be a candidate and to hold office (subject * * * to reasonable qualifications uniformly imposed * * *)." Eligibility requirements must be both reasonable (see, *e.g.*, *Wirtz* v. *Hotel, Motel and Club Employees Union, Local 6*, 391 U.S. 492 (1968)) and uniformly applied to all candidates to whom the requirements are applicable. The undisputed facts show that petitioner failed to apply Section 26 of the local constitution uniformly in determining the qualifications of Coffey and Dunaway.

Section 26 requires candidates to attend a majority of the union meetings held during the 12 months prior to the election or to submit excuses for nonattendance. Neither Coffey nor Dunaway satisfied that requirement; Dunaway attended only four and Coffey attended only one of the nine meetings held during the year preceding the election, and neither submitted any written excuses as required by Section 26.[3] Although neither candidate had complied with

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[3] The International ordered Dunaway installed as chairman, purportedly because he had written to the president of

the meeting attendance rules and Coffey had won the election, petitioner, on the instructions of the International, installed Dunaway as chairman. Thus, petitioner waived application of the meeting attendance and excuse rules with regard to Dunaway, but strictly enforced them with regard to Coffey. In holding Coffey, but not Dunaway, to strict conformity with the meeting attendance or excuse rule, petitioner plainly failed to meet the statutory requirement that election qualifications be "uniformly imposed." The district court thus correctly applied settled law to the undisputed facts of this case when it granted the Secretary's motion for summary judgment.[4]

2. Petitioner asserts (Pet. 13-18) that there were unresolved issues of material fact concerning

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Lodge 875 and asked to be excused from two meetings. Contrary to the requirements of the lodge's constitution, however, these excuses were not presented to the recording secretary, recorded in the minutes, or voted upon by the members. Since Rule 26 provides that "a majority vote of the members in attendance * * * [is] to determine acceptance or rejection of the offered excuse" (Pet. 24), petitioner's assertion that Dunaway's absences were "unquestionably" for "just and sufficient" reason (Pet. 27-28) is beside the point, as is the "good faith" of the local president (Pet. 25).

[4] Petitioner suggests (Pet. 9-10) that because other nominees who had not satisfied the meeting attendance requirement were removed from the offices they had won, petitioner consistently applied the requirement. The record shows, however, that no action was taken to remove the seven other candidates who were ineligible under Section 26 (R. 55) until six months after this action was filed. Although petitioner and the International knew all the facts regarding these seven candidates as early as January 23, 1978 (R. 54-56), only Coffey was removed from office in February 1978. The later removal of the seven officers thus is insufficient to excuse the illegal application of the rule to disqualify Coffey and not Dunaway.

Coffey's invocation of his internal union remedies, the timeliness of his complaint to the Secretary, and the timeliness of the Secretary's complaint. Section 402 (a) (2) of the Act, 29 U.S.C. 482(a) (2), provides that a member of a labor organization who has invoked available internal remedies without obtaining a final decision within three calendar months may file a complaint with the Secretary, alleging a violation of Section 401 of the Act, within the next calendar month. The purpose of the Section 402 exhaustion of remedies requirement is to put the union on notice of alleged violations of Section 401 and to give it an opportunity to resolve the matter internally prior to intervention by the government. See S. Rep. No. 187, 86th Cong., 1st Sess. 2 (1959); *Hodgson* v. *Local Union 6799, United Steelworkers of America, AFL-CIO*, 403 U.S. 333, 339-340 (1971); *Usery* v. *Local Union 1177, Laborers' Inter. Union*, 536 F.2d 583 (5th Cir. 1976).

Neither the Lodge 875 constitution nor the International constitution provides any specific procedure for protesting an election. Coffey and the lodge membership invoked the only available union remedy on January 16, 1978, by calling a special meeting regarding Dunaway's protest and sending a letter to the International requesting that Coffey's election be confirmed or, in the alternative, that a new election be held with an express waiver of the meeting attendance requirement. When the International directed that Dunaway be installed as chairman of the Local Protective Board, Coffey and the members of the lodge met on February 14, 1978, and voted to challenge Coffey's removal. On February 22, 1978, they reiterated their request for a new election to the International general president, who denied the appeal. After waiting

three months from the time of his initial invocation of the union's internal procedures without receiving a final decision, Coffey filed a complaint with the Secretary of Labor on May 15, 1978. Since Coffey filed his complaint with the Secretary within the fourth calendar month after the January 16 meeting and petition to the International, it was timely.[5] See *Shultz* v. *Local 1291, Longshoremen*, 429 F.2d 592 (3d Cir. 1970).[6]

Petitioner also contends (Pet. 18-22) that the district court erred in granting the Secretary's motion for summary judgment without ruling on petitioner's

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[5] Petitioner complains (Pet. 15-16) that no resort to the union procedures could have been made until after the decision to install Dunaway, which occurred on February 7, and therefore the February 22 letter to the International should be deemed the invocation of the internal union procedures for resolving the dispute. Thus, according to petitioner (Pet. 15), Coffey's May 15 complaint should have been filed on May 22, 1978. The Secretary's complaint was not filed until July 14, 1978 (Pet. 7). Moreover, on May 3, 1978, Coffey was informed by the International that no further action on his requests for relief could be taken until July 31, 1978 (Pet. 10). Even on petitioner's theory, the purpose of Section 402 was therefore plainly satisfied.

[6] Petitioner's observation (Pet. 19) that the notation indicating the date on which Coffey's complaint was received was handwritten rather than stamped as were the notations on other papers in the case is insufficient to raise a genuine issue of fact as to whether the complaint was received on May 15, 1978. See Rule 56(e), Fed. R. Civ. P. Examination of other papers in the record indicates that they were dated and stamped as having been received in Nashville. Coffey's complaint was received in Memphis, which may account for the difference in the method of recording the date of receipt. In any event, petitioner's bald assertion (Pet. 18) that the complaint was not filed on May 15 is insufficient under Rule 56(e).

motion to compel discovery. Petitioner sought to compel responses to interrogatories seeking the names of the employees of the Department of Labor who had interviewed petitioner's officers, the names of the persons interviewed, the dates on which they were interviewed, whether the statements of its officers were oral or written, and the content of their statements. The documents sought were the reports, memoranda, or other statements prepared as a result of the interviews. Much of the information sought was privileged. *See, e.g., Usery* v. *Local Union 720, Laborers' International Union*, 547 F.2d 525 (10th Cir. 1977). In any event, petitioner failed to file an affidavit indicating that the information sought was necessary to allow it to file affidavits in opposition to the Secretary's motion for summary judgment. See Rule 56(f), Fed. R. Civ. P. Thus, there was no reason for the district court to postpone ruling on the motion for summary judgment or to grant a continuance.

Similarly, petitioner's intention to take the depositions of various Department of Labor employees (Pet. 20) is insufficient under Rule 56(f). Petitioner was aware of the Secretary's pending motion for summary judgment. If the deposition testimony of these employees was necessary for respondent to file counter affidavits, Rule 56(f) provided an appropriate remedy. Having failed to make use of that remedy, petitioner cannot now complain that the district court ruled on the basis of the information before it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

BEATE BLOCH
Associate Solicitor

MARY-HELEN MAUTNER
RUTH E. PETERS
MARY S. ELCANO
Attorneys
Department of Labor

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